



deposited with the Endowment Foundation will be used to repay the \$250,000 to the Brain and Spinal Cord Injury Program Trust Fund.

This bill creates section 413.402, of the Florida Statutes.

## **II. Present Situation:**

### **Brain and Spinal Cord Injury Programs**

As specified in s. 381.7395, F.S., the Legislature intends that individuals who have moderate-to-severe brain or spinal cord injuries be referred to the Brain and Spinal Cord Injury Program (BSCIP) administered by the Department of Health. The program provides for rehabilitative services necessary for a recipient to be referred to an appropriate vocational rehabilitation program or to return to the community at an appropriate level of function.

The Department of Health is responsible for developing and administering a multilevel treatment program for persons suffering from brain and spinal cord injuries. Within 15 days of any report of an individual sustaining a brain or spinal cord injury, the department must notify the individual or the individual's family members of their rights to assistance from the state, the services available, and the eligibility requirements under s. 381.75(1), F.S. The department must refer injured persons to agencies offering rehabilitative services under s. 381.75, F.S. Further, the department must develop standards for emergency medical evacuation to ensure that persons with brain or spinal injuries are transported to a department-approved trauma center under s. 381.75(3), F.S. Standards for designation of rehabilitation centers and transitional living facilities for brain and spinal injuries are set by the department under ss. 381.75(4) and 381.74(6), F.S.

Eligibility for acceptance into the BSCIP under s. 381.76, F.S., is based on: referral to the central BSCIP registry under s. 381.74, F.S.; legal state residency at the time of application for services; the sustaining of a brain or spinal cord injury; sufficient medical stability; and a reasonable expectation of reintegration into the community through services provided by the program.

Under the provisions of s. 381.79(1)(b), F.S., the BSCIP trust fund provides funding for acute care, inpatient and outpatient rehabilitation, home and vehicle modification, and adaptive technology by a network of designated trauma, rehabilitation, and transitional living centers. The trust fund receives funding from fines levied for speeding, driving or boating under the influence, and surcharges on temporary license plates. The BSCIP acts as a "payer of last resort" and relies heavily on third party payment recoveries under s. 381.785, F.S., and comparable benefits for provision of rehabilitation services. A 16-member advisory council provides oversight of the program under s. 381.78, F.S.

Under s. 381.795, F.S., the department is required to study the long-term needs for community-based supports and services for individuals who have suffered brain and spinal injuries. The purpose of the initiative is to prevent inappropriate residential and institutional placement of injured persons and promote placement in the most cost effective and least restrictive environment under s. 381.795(1), F.S. The department is also required to establish a plan of

implementation of a program of community-based supports and services for injured individuals subject to inappropriate residential or institutional placement under s. 381.795(2), F.S.

### **Olmstead v. L.C., Medicare and Medicaid**

The *Olmstead v. L.C.*<sup>1</sup> case was first brought in 1995 by the Atlanta Legal Aid Society on behalf of two Medicaid recipients with developmental disabilities and psychiatric conditions who were patients in a state psychiatric hospital, against Tommy Olmstead, the Georgia Commissioner of Human Services. The treating professionals in the hospital agreed that the two recipients were appropriate for discharge into community programs but placements were not available. While the case worked its way through the courts, both recipients were placed in the community where they have been faring well. The case continued and was decided on the merits even though this particular situation was no longer in controversy.<sup>2</sup>

The claimants in *Olmstead v. L.C.* alleged that the failure to receive services in a community-based setting violated Title II of the Americans with Disabilities Act,<sup>3</sup> 29 USC s. 12132, and implementing regulations. Title II and its implementing regulations require public entities to administer their programs “in the most integrated setting appropriate to the needs of qualified individuals with disabilities,” that is, a setting which “enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible.” The state argued that “inadequate [Medicaid] funding” and not discrimination against the recipients was the basis for the continued institutionalization.

The federal district court granted summary judgment for the *Olmstead v. L.C.* plaintiffs and the state appealed. The Eleventh Circuit Court of Appeals ruled that the state’s failure to provide integrated community services violated the Americans with Disabilities Act and the state appealed that decision as well. The United State Supreme Court issued a ruling on June 22, 1999, stating that that unjustified institutionalization of people with disabilities is prohibited discrimination under the Americans with Disabilities Act. However, the court clarified that Title II does not require measures that would “fundamentally alter” the nature of a public entity’s programs. This “fundamental alteration” is the concept under the Americans with Disabilities Act that governs the extent to which a public entity must modify its program to comply with the Act, making clear that the right of people with disabilities to receive services in the “most integrated setting” is not absolute.

In *Olmstead v. L.C.*, the Supreme Court indicated that, in evaluating a state’s “fundamental alteration” defense, courts are to consider not only the cost of providing community-based care to individuals but also the range of services the state provides to persons with disabilities and the state’s obligation to mete out those services in an equitable manner.

The federal Center for Medicare and Medicaid Services (formerly known as the Health Care Financing Administration or HCFA) within the Department of Health and Human Services,

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<sup>1</sup> 119 S.Ct. 2176, 527 U.S. 581, 144 L.Ed.2d 540 (1999).

<sup>2</sup> This form of jurisdiction is commonly termed “capable of repetition, yet evading review.”

<sup>3</sup> The Americans with Disabilities Act was signed into law on July 26, 1990, and has been described by many advocates as “wide-ranging legislation intended to make American society more accessible to people with disabilities.”

which regulates the Medicaid<sup>4</sup> and Medicare programs, has issued a series of letters and memos designed to clarify how the Center for Medicare and Medicaid Services is responding to the challenges presented by the *Olmstead v. L.C.* decision. The Center for Medicare and Medicaid Services has recently provided technical assistance and clarification about how to use existing services and options to transition Medicare and Medicaid patients from an institutional setting to the community.

According to Center for Medicare and Medicaid Services, case management services are proper to assist disabled Medicare beneficiaries and Medicaid recipients in gaining access to needed medical, social, educational, and other services. Case management services are often used to foster and maintain the transitioning of a person from institutional care to a more integrated community setting and there are several methods by which case management services may be furnished under the Medicaid program for disabled recipients:

- Targeted case management may be furnished as a service to institutionalized persons who are about to be discharged to facilitate the process of transition to community services and to enable the person to gain access to needed medical, social, educational and other services in the community.
- Home and Community Based Services Case Management may be furnished when this service is included in an approved state waiver program. Persons served under a waiver may receive case management services while they are still institutionalized for up to 180 consecutive days prior to discharge.
- Administrative Case Management may be furnished as an administrative activity, necessary for the proper and efficient administration of a state Medicaid plan.

The Center for Medicare and Medicaid Services has advised that states may assess the accessibility and need for modification in a disabled person's home or vehicle at any time. Medicaid matching dollars may be available to cover these costs for otherwise eligible recipients.

In some cases it may be necessary to make environmental modifications to a disabled individual's home before the individual transitions from an institution to the community. The Center for Medicare and Medicaid Services has authorized states to allow Medicaid reimbursement for home modifications (including actual construction costs) furnished as a waiver service for up to 180 days prior to discharge.

### **Personal-Care Attendants**

“Personal assistance services” is defined as a range of services, provided by one or more individuals, which are designed to assist an individual who has a disability to perform activities of daily living under s. 381.745(4), F.S. The term “activity of daily living” is defined as an activity required on a frequent basis which permits an individual to secure or maintain independence, including personal home care, transportation, personal assistance services, housekeeping, shopping, attending school, communication, and employment under s. 381.745(1), F.S.

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<sup>4</sup> Medicaid is a jointly-administered state and federal program.

Disabled persons and their advocates have developed formal and informal determinations of what constitutes a “personal-care attendant” and tend to differentiate such a person from the personal-care services available from home health agencies or the informal assistance available from family and friends. One resource put it this way:

“Personal” assistance means that users exercise the maximum control over how services are organized and custom-design their services according to their individual needs, capabilities, life circumstances and aspirations. In particular, personal assistance requires that the individual user decides who is to work, with which tasks, at which times, where and how. Therefore, the individual user must be able to recruit, train, schedule, supervise, and, if necessary, fire his or her own assistants. Simply put, “personal assistance” means that the user is the boss.

The State of Pennsylvania began a demonstration project under state law in 1986 to provide greater independence for people with disabilities by a home-based personal services program. Currently under the program, there are more than 400 highly qualified, trained personal-care attendants employed by more than 405 people with physical disabilities. The Pennsylvania program is funded by a variety of sources, including state and federal agencies. Recipients who do not receive benefits from Social Security or the state’s medical assistance program pay for a portion of their attendant-care service. Recipient contribution is based on a sliding fee scale to accommodate each individual’s ability to pay.

Currently, Florida does not have any programs to train personal-care attendants or to subsidize attendant-care services for individuals who are gainfully employed and do not qualify for Medicaid or vocational rehabilitation.

### **Revenue Collections for Unpaid Taxes**

According to the Revenue Estimating Conference, the sales tax estimate for FY 2001-2002 includes \$158.1 million from recovery of unpaid taxes. Pursuant to s. 212.20, F.S., this money will be distributed to General Revenue, the Solid Waste Management Trust Fund, local governments, and sports facilities.

### **III. Effect of Proposed Changes:**

**Section 1.** Creates s. 413.402, F.S., to provide that FACIL develop the Personal Care Attendant Pilot Program for personal-care attendants to individuals:

- at least 18 years of age and seriously disabled due to a traumatic spinal cord injury;
- living in a nursing home or who have moved out of a nursing home within the preceding 180 days due to participation in a Medicaid home and community-based waiver program targeted to persons with brain or spinal cord injuries; and
- determined eligible for training services from the Division of Vocational Rehabilitation of the Department of Education.

The bill requires FACIL to develop memorandums of understanding with the Department of Revenue, the Brain and Spinal Cord Injury Program in the Department of Health, the Florida Medicaid Program in the Agency for Health Care Administration, the Florida Endowment Foundation for Vocational Rehabilitation, and the Division of Vocational Rehabilitation of the Department of Education. FACIL is to develop a training program for persons selected to participate in the pilot program in order to prepare each recipient to manage his or her own personal-care attendant.

The bill states that FACIL, in cooperation with the Florida Endowment Foundation for Vocational Rehabilitation, will develop a program to:

- recruit, screen, and select candidates to be trained as personal-care attendants;
- develop a training program for personal-care attendants; and
- establish procedures for selecting persons eligible to participate in the pilot program.

In cooperation with the Division of Vocational Rehabilitation in the Department of Education, FACIL will assess the selected participants and make recommendations for their placement into appropriate work-related training programs. FACIL is to develop a plan for implementation of the program with the Department of Revenue, the Brain and Spinal Cord Injury Program in the Department of Health, the participating state attorneys' offices, the Florida Medicaid Program in the Agency for Health Care Administration, the Florida Endowment Foundation for Vocational Rehabilitation, and the Division of Vocational Rehabilitation of the Department of Education.

An implementation plan for the pilot program must be presented by FACIL to the Legislature by March 1, 2003, that will include:

- a timeline for implementation;
- estimates of the number of participants to be served; and
- cost projections for each component of the pilot program.

The pilot program will be implemented by July 1, 2003, unless there is specific legislative action to the contrary.

**Section 2.** Provides that the Department of Revenue in coordination with FACIL and the Florida Prosecuting Attorneys Association select four counties in which to operate the pilot program. The Association and the state attorneys' offices in Duval County and the other pilot program counties shall develop and implement a tax collection enforcement diversion program that will collect revenue from persons who have not remitted their collected sales tax. The criteria for referral to the diversion program will be determined cooperatively between the state attorneys' offices in those counties and the Department of Revenue.

The bill states that 25 percent of the funds collected under the diversion program will be deposited in the operating account of the Florida Endowment Foundation for Vocational Rehabilitation and used to implement the program and that the program will operate only from funds deposited into that account. Each year the revenue estimating conference is to project the amount of money likely to be generated from the tax collection enforcement diversion program.

**Section 3.** Provides for an appropriation of \$250,000 of nonrecurring funds from the Brain and Spinal Cord Injury Program Trust Fund to the Florida Endowment Foundation for Vocational Rehabilitation for FY 2002-2003 for the initial development of the program. The initial \$50,000 from each of the pilot program counties deposited with the Florida Endowment for Vocational Rehabilitation will be used to repay the \$250,000 to the Brain and Spinal Cord Injury Program Trust Fund.

**Section 4.** The bill, should it become law, shall be effective July 1, 2002.

**IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

**V. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The impact of the tax collection enforcement diversion program will affect only those persons who fail to remit collected sales tax revenues.

SB 576 will benefit those persons with a disability who obtain a personal-care attendant and meet the selection criteria as specified in the bill.

C. Government Sector Impact:

The bill specifies that \$250,000 of nonrecurring funds will be transferred from the Brain and Spinal Cord Injury Program Trust Fund to the Florida Endowment Foundation for Vocational Rehabilitation for FY 2001-2002 to implement the Personal-Care-Attendant Pilot Program. The bill states that the initial \$50,000 from each of the four pilot program counties deposited with the Florida Endowment for Vocational Rehabilitation will be used to repay the \$250,000 to the Brain and Spinal Cord Injury Program Trust Fund. This provision will result in repaying the Trust Fund \$200,000 of the \$250,000, leaving the Trust Fund with a deficit of \$50,000.

It has not been determined by the Department of Health if sufficient surplus funds will be available in the Trust Fund account in FY 2002-2003 to accommodate this transfer.

Funds from the Brain and Spinal Cord Injury Trust Fund will be used to initiate the pilot program. There may be options available for Medicaid funding for eligible services, which would bring approximately 56 cents of federal dollars into the state for every 44 cents of state money expended. To the extent that the newly created sales tax collection diversion program captures "new" funds, there is no cost to the state for the program.

The Department of Revenue states that additional resources may be needed to develop a computerized system for distributing diversion program funds.

**VI. Technical Deficiencies:**

The provision in the bill specifying that the initial \$50,000 from each of the four pilots be used to repay the Brain and Spinal Cord Injury Trust Fund will result in a repayment of \$200,000 rather than \$250,000, resulting in a trust fund deficit of \$50,000.

**VII. Related Issues:**

None.

**VIII. Amendments:**

# 1 by Children and Families:

Specifies that in addition to the four counties operating a pilot program, Duval county will also deposit \$50,000 into the Florida Endowment Foundation for Vocational Rehabilitation in order to repay the \$250,000 of nonrecurring funds to the Brain and Spinal Cord Injury Program Trust Fund used to initiate the personal care attendant pilot program.